

change. It appears that the first processing operations ordinarily performed on the fishing vessels at sea consist for the most part of eviscerating, removal of the gills, beheading certain fish that have large heads, and the removal of the scallop from its shell. Icing or freezing operations, which ordinarily immediately follow these operations, would also constitute an integral part of the first processing operations, as would such activities as filleting, cutting, scaling, or salting when performed as part of a continuous series of operations. Employment aboard the fishing vessel in freezing operations thus performed is within the exemption if the first processing of which it is a part otherwise meets the conditions of section 13(a)(5), notwithstanding the transfer by the 1961 amendments of "freezing", as such, from this exemption to the exemption from overtime only provided by section 13(b)(4). Such preliminary operations as cleaning, washing, and grading of the marine products, though not exempt as first processing since they effect no change, would be exempt as part of first processing when done in preparation for the first processing operation described above including freezing. The same would be true with respect to the removal of the waste products resulting from the above described operations on board the fishing vessel.

§ 784.134 "Canning."

The term "canning" was defined in the legislative history of the 1949 amendments (House (Conference) Report No. 1453, 81st Cong., first session; 95 Cong. Rec. 14878, 14932-33). These amendments made the "canning" of marine products or byproducts exempt from overtime only under a separate exemption (section 13(b)(4), and subject to the minimum wage requirements of the Act (see § 784.136 et seq.). The same meaning will be accorded to "canning" in section 13(a)(5) as in section 13(b)(4) (see § 784.142 et seq.) subject, of course, to the limitations necessarily imposed by the context in which it is found. In other words, although certain operations as described in § 784.142 et seq. qualify as canning, they are, nevertheless, not exempt under section 13(a)(5) unless they are performed on marine

products by employees of the fishing vessel at sea as an incident to, or in conjunction with the fishing operations of the vessel.

§ 784.135 "Packing."

The packing of the various named marine products at sea as an incident to, or in conjunction with, the fishing operations of the vessel is an exempt operation. The term "packing" refers to the placing of the named product in containers, such as boxes, crates, bags, and barrels. Activities such as washing, grading, sizing, and placing layers of crushed ice in the containers are deemed a part of packing when performed as an integral part of the packing operation. The packing operation may be a simple or complete and complex operation depending upon the nature of the marine product, the length of time out and the facilities aboard the vessel. Where the fishing trip is of short duration, the packing operation may amount to no more than the simple operation, of packing the product in chipped or crushed ice in wooden boxes, as in the case of shrimp, or placing the product in wooden boxes and covering with seaweed as in the case of lobsters. Where the trips are of long duration, as for several weeks or more, packing the operations on fishing vessels with the proper equipment sometimes are integrated with first processing operations so that together these operations amount to readying the product in a marketable form. For example, in the case of shrimp, the combined operations may consist of the following series of operations—washing, grading, sizing, placing 5-pound boxes already labeled for direct marketing, placing in trays with other boxes, loading into a quick freezer locker, removing after freezing, emptying the box, glazing the contents with a spray of fresh water, replacing the box, putting them in 50-pound master cartons and finally stowing in refrigerated locker.

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GENERAL CHARACTER AND SCOPE OF THE SECTION 13(A)(4) EXEMPTION

§ 784.136 “Shore” activities exempted under section 13(b)(4).

Section 13(b)(4) provides an exemption from the overtime but not from the minimum wage provisions of the Act for “any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing” aquatic forms of animal and vegetable life or any by-products thereof. Originally, all these operations were contained in the exemption provided by section 13(a)(5) but, as a result of amendments, first “canning”, in 1949, and then the other operations in 1961, were transferred to section 13(b)(4). (See the discussion in §§ 784.102 to 784.105.) These activities are “shore” activities and in general have to do with the movement of the perishable aquatic products to a non-perishable state or to points of consumption (S. Rept. 145, 87th Cong., first session, p. 33).

§ 784.137 Relationship of exemption to exemption for “offshore” activities.

The reasons advanced for exemption of employment in “shore” operations, now listed in section 13(b)(4), at the time of the adoption of the original exemption in 1938, had to do with the difficulty of regulating hours of work of those whose operations, like those of fishermen, were stated to be governed by the time, size, availability, and perishability of the catch, all of which were considered to be affected by natural factors that the employer could not control (see 83 Cong. Rec. 7408, 7422, 7443). The intended limited scope of the exemption in this respect was not changed by transfer of the “shore” activities from section 13(a)(5) to section 13(b)(4). The exemption of employment in these “shore” operations may be considered, therefore, as intended to implement and supplement the exemption for employment in “offshore” operations provided by section 13(a)(5), by exempting from the hours provisions of the Act employees employed in those “shore” activities which are necessarily somewhat affected by the same natural factors. These “shore” activities are affected primarily, however, by

fluctuations in the supply of the product or by the necessity for consumption or preservation of such products before spoilage occurs (see *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52; cf. *McComb v. Consolidated Fisheries*, 174 F. 2d 74).

§ 784.138 Perishable state of the aquatic product as affecting exemption.

(a) Activities performed after conversion of an aquatic product to a non-perishable state cannot form the basis for application of the section 13(b)(4) exemption unless the subsequent operation is so integrated with the performance of exempt operations on the aquatic forms of animal and vegetable life mentioned in the section that functionally and as a practical matter it must be considered a part of the operations for which exemption was intended. The exemption is, consequently, not available for the handling or shipping of nonperishable products by an employer except where done as a part of named operations commenced on the product when it was in a perishable state. Thus, employees of dealers in or distributors of such nonperishable products as fish oil and fish meal, or canned seafood, are not within the exemption. Similarly, there is no basis for application of the exemption to employees employed in further processing of or manufacturing operations on products previously rendered nonperishable, such as refining fish oil or handling fish meal in connection with the manufacture of feeds. Further specific examples of application of the foregoing principle are given in the subsequent discussion of particular operations named in section 13(b)(4).

(b) In applying the principle stated in paragraph (a) of this section, the Department has not asserted that the exemption is inapplicable to the performance of the operations described in section 13(b)(4) on frozen, smoked, salted, or cured fish. The Department will continue to follow this policy until further clarification from the courts.

§ 784.139 Scope of exempt operations in general.

Exemption under section 13(b)(4), like exemption under section 13(a)(5),